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Supreme Court, U.S.
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No. 00-1123

In The

Supreme Court of the United States

CHRISTOPHER M. FEIST and ANDREW N. SCHWARTZ; CHAPTER 7 TRUSTEE,

Petitioners,

v.

CONSOLIDATED FREIGHTWAYS CORP., t/a CF MOTOR FREIGHT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was it an abuse of discretion for the district court to find that Petitioner Christopher Feist had not made an honest mistake when, following his discharge from bankruptcy, Feist commenced suit in his own name to pursue a pre-petition claim that he had failed to disclose in his bankruptcy, and for the district court to refuse to permit substitution of the bankruptcy trustee as plaintiff pursuant to Federal Rule of Civil Procedure 17(a) when the evidence of record demonstrates that Feist: (1) did not seek bankruptcy protection for many years after he became insolvent; (2) filed for bankruptcy only after obtaining a "valuable" personal injury claim; (3) failed to list the claim on his bankruptcy petition; (4) failed to disclose the claim when questioned by the Trustee under oath; (5) interviewed four different attorneys regarding the personal injury claim immediately following closure of his bankruptcy case; and, (6) aggressively pursued the claim seeking an amount in excess of $1,000,000.00 following his bankruptcy discharge?

2. Did the district court err when it refused to give preclusive estoppel effect to an order of the bankruptcy court which held that Feist did not commit fraud when he failed to disclose his personal injury claim on his bankruptcy petition, where the specific issue before the district court was different (whether Feist made an honest mistake when he commenced suit in his own name months later), where the bankruptcy court's order was not a final judgment on the merits and where Respondent Consolidated Freightways was not a party to the bankruptcy proceeding?

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BRIEF IN OPPOSITION

Respondent Consolidated Freightways Corp., t/a CF Motor Freight ("CF"), respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") of Petitioners Christopher M. Feist ("Feist") and Andrew N. Schwartz, Chapter 7 Trustee ("Trustee").

COUNTERSTATEMENT OF OPINIONS BELOW

Petitioners have included as "Opinions Below," and attached as part of their Appendix, selective and excerpted comments made by Judge Scholl at the hearing to reopen the bankruptcy of Feist. These comments are not part of the Judge's Order, which is included in the Appendix at 12, and their inclusion as "Opinions Below" is inaccurate and contrary to Rule 24(d). Should the Court wish to refer to the transcript of that argument, a full copy is presented at CA3 App. 929-984.[1]

COUNTERSTATEMENT OF JURISDICTION

On April 29, 1999, Feist filed a notice of appeal with the United States Court of Appeals for the Third Circuit from the district court's order granting judgment on the pleadings. This appeal was docketed at 99-1348. On the same day, the Trustee filed an appeal docketed at 99-1349 and also moved for leave to proceed as an amicus curiae in the Feist appeal. On January 14, 2000, the two appeals were consolidated for disposition and the Trustee's

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[1] References herein to "App." are to the corresponding page numbers of the Petitioners' Appendix. References to "R. App." are to the corresponding page numbers of the Respondent's Appendix attached hereto. References to "CA3 App." are to the corresponding page numbers of the Joint Appendix presented to the United States Court of Appeals for the Third Circuit in the appeal docket with that court at 99-1348.

motion for leave to proceed as amicus curiae was deemed withdrawn in light of the order granting consolidation.

The judgment of the United States Court of Appeals for the Third Circuit affirming the dismissal of petitioner Feist's civil action was filed and entered on May 10, 2000. A timely petition for rehearing was denied by Order dated August 10, 2000. (App. 32-33).

On November 1, 2000, Feist filed a Motion for Extension of Time in which to file a Petition for Writ of Certiorari. (R. App. 1-36). Justice Souter granted Feist an extension of time until January 5, 2001 for the filing of his Petition. (R. App. 37). The Trustee, however, did not move for an extension of time.[2] The Trustee's Petition – filed fifty-eight days beyond the ninety-day limitations period prescribed by 28 U.S.C. § 2101(c) – is jurisdictionally out of time and should be stricken. *See* 28 U.S.C. § 2101(c); Rule 13(1), (2) and (3) of the Rules of the Supreme Court of the United States; *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

STATUTORY PROVISIONS INVOLVED

The full text of Rule 17(a) and the pertinent parts of the Advisory Committee Notes to the 1966 Amendments are attached in Respondent's Appendix hereto, R. App. 38-41.

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[2] "In multiparty situations, an extension of time thus obtained is effective only as to those parties named as applicants or petitioners in the application or motion. Those parties not so named do not secure the benefit of any extension granted in response to the application; they must then file their own application or be bound by the original time limitation in filing their petitions for certiorari." Robert L. Stern, et al., *Supreme Court Practice* § 6.5, at 291 (7th ed. 1993).

COUNTERSTATEMENT OF THE CASE

In their Statement of the Case, Feist and the Trustee omit material facts of record in this case. Feist and the Trustee also misstate the district court's opinion and contrive a conflict in the decisions of the circuit courts where none exists. Pursuant to Rule 15 of the Rules of this Court, CF's Counterstatement of the Case addresses these misstatements and omissions.

A. The Proceedings Before the Honorable Robert F. Kelly

Feist filed a personal injury action against CF on July 21, 1997 based on an alleged incident that had occurred almost two years before at his place of employment. Feist claims he was severely injured when assisting a CF driver in unloading a pallet of materials and, as a result, is entitled to substantial compensatory damages.[3] (CA3 App. 001 – 017). Less than two months before a jury trial was to commence before the Honorable Robert F. Kelly, CF discovered that Feist had filed bankruptcy under Chapter 7 of the Bankruptcy Code on January 16, 1997, *after* the alleged incident giving rise to his claimed damages. (CA3 App. 018). CF's counsel immediately advised Feist's counsel of the bankruptcy and, with permission of the district court, CF engaged in limited discovery regarding the bankruptcy proceeding. (CA3 App. 096).

During discovery on this issue, CF determined that Feist's bankruptcy petition listed debts of $155,887.54

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[3] Contrary to the assertions of Petitioners, these facts are the only ones contained in the Complaint. All other facts relevant to this Petition occurred subsequent to the filing of the Complaint and are supported by reference to the record submitted to the United States Court of Appeals for the Third Circuit.

owed to 82 creditors (primarily credit card debt), personal property in the amount of $6,125 and several thousand dollars worth of property claimed exempt. (CA3 App. 025-031). The petition did not list Feist's claim against CF and, in fact, stated that Feist possessed no contingent or unliquidated claims. (CA3 App. 022 – 067). When questioned by the Trustee at the meeting of creditors, Feist denied having any personal injury actions or claims against anyone for any reason. (CA3 App. 121). Feist's debts were discharged on April 30, 1997 and the bankruptcy closed on May 9, 1997, approximately two months before Feist brought suit against CF. (CA3 App. 068). Within two to three weeks after his discharge from bankruptcy, Feist had interviewed four separate personal injury attorneys for the purposes of bringing a claim against CF. (CA3 App. 547).

On June 1, 1998, CF filed a motion for judgment on the pleadings because the claim against it was an asset of the bankruptcy estate which was neither abandoned by the trustee nor administered by the estate; therefore, Feist did not have standing to bring the action or to continue to prosecute it. (CA3 App. 084 – 087).

On June 9, 1998, Judge Kelly heard argument on CF's motion for judgment on the pleadings based on Feist's lack of standing. During argument, Feist's counsel asserted that Rule 17(a) should be applied to permit the bankruptcy trustee to substitute as the plaintiff. Judge Kelly requested that the parties brief this issue. Thereafter, on June 16, 1998, Feist filed a petition pursuant to Rule 17(a) to amend his complaint and to allow reasonable time for the bankruptcy court to reopen the bankruptcy of Feist and appoint a trustee to substitute or join in the civil action. (CA3 App. 211 – 212).

B. The Proceedings Before The Bankruptcy Court

At the same time – more than one year after Feist's debts had been discharged – Feist and the Trustee moved to reopen Feist's bankruptcy in order to administer the claim against CF. (CA3 App. 149 – 151). On June 17, 1998, while not a party to the bankruptcy, CF filed a response opposing the Trustee's motion to reopen for the reason that Feist was guilty of fraud and therefore, the case should not be reopened under section 350(b) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 5010. (CA3 App. 305 – 314). On June 18, 1998, the bankruptcy court heard argument on the motion and held an unscheduled, evidentiary hearing on the issue of whether the bankruptcy should be opened. The narrow issue before the court was whether Feist had committed fraud when he failed to list his claim against CF on his petition. During the hearing, the Petitioners provided testimony and counsel each argued their positions. (CA3 App. 316 – 366). At the conclusion of the hearing, the bankruptcy court issued an order finding "that the debtor committed no fraud" and ordering the case reopened, with Mr. Andrew Schwartz reappointed as trustee. (CA3 App. 226, 368).

The next day, the Trustee entered his appearance in the district court, and moved to be substituted in the proceeding as the real party in interest. (CA3 App. 224 – 234).

C. The Evidentiary Hearing Before Judge Kelly

On November 19, 1998, an evidentiary hearing was held before Judge Kelly on the issue of whether Feist committed an honest mistake when he initiated the lawsuit against CF in his own name. (CA3 App. 449 – 741).[4]

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[4] A month earlier, on October 19, 1998, Feist moved for summary judgment with respect to his intent when bringing

The following evidence was developed at that hearing:

During 1991 to 1993, Feist incurred in excess of $155,000 of mostly out-of-state debt. (CA3 App. 034 – 044, 157 – 161). This debt was so problematic that Feist considered filing bankruptcy in 1992 or 1993, consulted a lawyer in Utah on this issue, but chose not to invoke the protections of the bankruptcy laws. (CA3 App. 190). Instead, in 1993, he relocated to Philadelphia and informed his creditors that "he couldn't service the debt anymore and to stop calling me." (CA3 App. 161, 163). Feist knew that under the law, his creditors could not call and harass him. (CA3 App. 163). Feist submitted absolutely no evidence that he attempted to pay off his creditors or that his creditors were seeking payment since 1993. Yet, in 1997 – four years after incurring the substantial debt – Feist suddenly decided to file bankruptcy. The bankruptcy was initiated after the date Feist maintains he was injured at the hands of CF's truck driver.

Feist's sworn bankruptcy petition stated that he possessed no contingent or unliquidated claims, a fact he confirmed at the meeting of creditors when he testified that he had no personal injury actions or claims of any kind. (CA3 App. 121, 028). On April 30, 1997, Feist was discharged from bankruptcy in a "no asset" case and his substantial debts were wiped away. (CA3 App. 547). On May 9, 1997, the bankruptcy case was closed and the Trustee discharged. (CA3 App. 547). Within two to three

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suit in his name rather than in the name of the Trustee, arguing that the district court was bound by a prior determination of the bankruptcy court on the motion to reopen Feist's bankruptcy proceedings. (CA3 App. 268 – 276). The Trustee joined in the motion for summary judgment (CA3 App. 436-4437), which CF opposed. (CA3 App. 407 – 432). The district court denied that motion by order dated November 13, 1998. (CA3 App. 433). This "collateral estoppel" issue was appealed to the Third Circuit.

weeks of the discharge, Feist interviewed attorneys from four different law firms with respect to bringing a claim against CF. (CA3 App. 547). He retained trial counsel on May 30, 1997 and seven weeks later filed, in his individual capacity, a personal injury action against CF seeking in excess of one million dollars. (CA3 App. 537, 001).

Feist also testified as to very inconsistent versions regarding why he waited until after his bankruptcy discharge to bring a claim against CF. Prior to CF's discovery of Feist's bankruptcy, Feist testified at his deposition that from the moment the incident occurred, he concluded that CF's driver was at fault, (CA3 App. 460 – 461), that the driver's actions caused his injuries, (CA3 App. 461), and that the CF driver "orchestrated" the situation and disregarded Feist's health and safety. (CA3 App. 484 – 485). When asked why he made the decision to see a personal injury lawyer, Feist responded "I basically felt that he [CF's truck driver] was to blame for what happened, or his company or him himself. That's how I came about deciding. (CA3 App. 613). Yet, when asked *why he waited until May of 1997* to see a personal injury lawyer, Feist said, "I didn't want to try to get involved in the courts or go after anybody. I just wanted to hide." (CA3 App. 613 – 614).

Feist's version of events clearly changed following CF's discovery of his bankruptcy. Now, when asked in June of 1998 (after his bankruptcy had been discovered), why he waited so long to file the personal injury action, Feist responded that he had no idea he had a claim until mid-May of 1997. (CA3 App. 1007).

Feist's story changed yet again at the November 19 hearing, albeit subtly. During the hearing, Feist maintained that the first time he had any inkling about a possible third-party suit was when he discussed it with his uncle in the course of revealing his dissatisfaction with his workers' compensation carrier. At the hearing,

Feist testified that he felt harassed by his workers' compensation carrier and was scared that his benefits would be cut off because he had been scheduled for an independent medical examination. (CA3 App. 474 – 478). These facts were not mentioned by Feist at his earlier depositions before his bankruptcy discharge was known to opposing counsel, although he was asked directly why he waited so long to seek legal counsel. (CA3 App. 613-614).

Finally, as of mid-May 1997, only weeks after having been discharged in bankruptcy of debts in excess of $150,000, Feist learned from no less than four attorneys that the workers' compensation laws did not preclude his right to bring a third-party claim and therefore, that his bankruptcy petition and the sworn testimony he had given the Trustee were obviously false. Yet, at no time did he contact his bankruptcy counsel to advise him of this fact. (CA3 518). Nor did he contact the former Trustee, Mr. Schwartz, to advise him of this fact. (CA3 518). Instead, Feist waited until CF discovered and alerted his counsel of the bankruptcy filing – nearly one year later – and he was forced to notify the Trustee.

D. The Trial Court's Decision

On March 31, 1999, the district court entered an order denying Feist's motion to substitute and granting CF's motion for judgment on the pleadings against Feist in his individual capacity. (App. 14). The district court filed a nineteen-page Memorandum setting forth the factual and legal basis for the court's determination. (App. 15-32).

In his Memorandum, Judge Kelly made the legal determination that Feist was not the real party in interest in this matter as the claim became the property of the bankruptcy estate and could only be maintained by the

bankruptcy trustee.[5] (App. 15-16). Judge Kelly also concluded that under Rule 17(a), an action should be dismissed when not brought by the real party in interest unless the determination of the real party in interest was difficult or an excusable mistake had been made. (App. 17-19).

Contrary to Petitioners' assertions, Judge Kelly did not invent a new test for Rule 17(a), nor did he place an insurmountable burden on Petitioners by requiring Feist to "eliminate doubts" whether he had initiated the action in his own name as the result of an "honest mistake." (Petitioners' Brief at 11). At least four separate times in his written opinion, Judge Kelly makes it clear that Feist simply had to "sustain his burden of proof which required that he demonstrate that when he filed this action in his own name it was the result of an honest mistake." (App. 30, 19, 28, 29). This was no more than a preponderance standard as borne by any movant.

Judge Kelly analyzed the evidence and concluded that Feist had not made an honest mistake in filing a personal injury claim in his own name, based upon the following subsidiary findings of fact regarding Feist's intent:

- " . . . [I]t is doubtful that Plaintiff delayed his bankruptcy petition because he was attempting to repay his creditors. It is more likely

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[5] Petitioners embellish the record on this point in stating that the district court found that Feist had at least an equitable interest in the case, "in that he stood to gain from the very substantial value that the cause of action appeared to have in excess of all the claims of his creditors." (Petitioners' Brief 9). The district court simply stated that Feist had standing as the alleged injured party in the complaint. No mention was made as to the purported value of his claim. (App. 17).

that Plaintiff never previously filed for bankruptcy because he had no assets to protect." (App. 23).

- "The aggressiveness with which [Feist] pursued this litigation immediately after his bankruptcy case was closed also raises questions about Plaintiff's intent. Plaintiff testified that within three weeks following the close of his bankruptcy case he spoke with four different attorneys regarding a possible claim against Defendant. Within just a few weeks he had retained counsel and filed a lawsuit." (App. 25-26).
- "Plaintiff incurred the majority of his debt prior to 1994. While his Chapter 7 petition filed in 1997 lists claims in excess of $155,000, more than $145,000.00 of that amount was incurred in 1993 or earlier. It is remarkable that, given this substantial amount of debt, Plaintiff waited until 1997 to file his bankruptcy petition." (App. 22).
- " . . . Plaintiff's own testimony casts doubt upon this purported reason for the delay [in filing his Chapter 7 petition – because he was attempting to repay his creditors.] At his deposition, Plaintiff testified that he had stopped making payments to the vast majority of his creditors in 1992 or 1993. . . . Plaintiff did not notify his creditors that he had moved to Philadelphia. Indeed, he had informed his creditors that he was unable to repay them. It seems rather unlikely, then, that Plaintiff intended to repay his creditors when he had already informed them that he would not pay his debts and had failed to notify them of his change of address. Further, the fact Plaintiff told his creditors to stop calling him because he knew that 'by law, they had to stop doing that' shows a certain

amount of sophistication on his part regarding management of his debts." (App. 23-25).

- "The questions that are naturally raised by the swiftness with which Plaintiff sought legal representation after his bankruptcy case was closed are not fully answered by Plaintiff's testimony . . .

  While Plaintiff's testimony at the second deposition and his testimony at the hearing do not directly contradict his testimony at the first deposition, it is somewhat puzzling that the only reason he originally gave for his delay in seeking an attorney was that he 'didn't want to try to get involved in the courts or go after anybody.' Yet, after Defendant's discovery that Plaintiff had filed a bankruptcy petition, Plaintiff testified at the second deposition and at the hearing that his delay was also caused by the fact that he did not believe he had any claim against Defendant until May of 1997. He further testified that a conversation with his uncle prompted his search for an attorney, a fact he did not state at his first deposition despite the fact that he was asked what led him to seek an attorney." (App. 26, 28).

- "Plaintiff's lack of interest in filing a petition in bankruptcy for several years until after he had acquired what he believed was a significant asset makes his stated intentions appear dubious. His subsequent failure to list this claim as an asset on his bankruptcy petition further adds suspicions about his motivation. Moreover, Plaintiff began an aggressive search for an attorney immediately after his bankruptcy case was closed. The timing of these actions by Plaintiff certainly gives the Court reason to doubt that when he finally did bring this action in his own name, he did

so as the result of an honest mistake." (App. 28-29).

Based on all the evidence presented by the parties, Judge Kelly concluded that Feist failed to prove that, when bringing this action in his own name, he committed an honest mistake and, accordingly, would not permit the Trustee to be substituted as the real party in interest. (App. 30).

E. The Decision of the United States Court of Appeals for the Third Circuit

On appeal, the Third Circuit reviewed the district court's determination that Feist had not made an honest mistake in bringing the action in his own name for abuse of discretion. In affirming the decision below, the Third Circuit agreed that substitution pursuant to Rule 17(a) is not a matter of right, but allowed only when an honest or understandable mistake has been made in choosing the party in whose name the action is to be filed. (App. 3-4). The Third Circuit reviewed in detail the facts that lead to the district court's conclusion, and expressly held that under this set of facts, it could not "say that the District Court abused its discretion" when it found that Feist had not made an honest mistake. (App. 4-5).

The Third Circuit also rejected Petitioners' argument that the district court was estopped from finding that Feist had not made an honest mistake because of the bankruptcy court's prior determination that Feist had committed no fraud in reporting his assets in bankruptcy. In reaching this conclusion, the Third Circuit emphasized that because Feist filed suit against CF approximately five months *after* the events considered by the bankruptcy court, there was no identity of issues, and the bankruptcy court's finding of "no fraud" had no preclusive effect. (App. 5-6, n.1). Finally, the Third Circuit also rejected Feist's argument that denying substitution was unjust to the creditors, stating that to accept this argument would

be to render Rule 17 inoperative as substitution "would have to be allowed in all cases where the statute of limitations has run." (App. 6, n.2).

On August 10, 2000, the full court denied Feist's Sur Petition For Rehearing En Banc. (App. 32-33).

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petitioners ask the Court to grant certiorari because they contend the Third Circuit Court of Appeals has entered a decision with regard to Rule 17(a) that conflicts with decisions of other United States courts of appeals, because the Third Circuit failed to consider the impact of its decision on the Chapter 7 creditors, and because the district court and the Third Circuit purportedly disregarded this Court's standards in enforcing collateral estoppel in federal courts.

This case, however, is not a matter of high importance in need of Supreme Court review. It is simply a case in which the trial court made findings of fact based on compelling (albeit highly contested) evidence concerning the intent of a plaintiff. It then applied those facts to established law to arrive at its decision against substitution of the Trustee.

Contrary to Petitioners' assertions, there is no conflict among the decisions of the United States courts of appeals on the Rule 17(a) standard for substitution. All of the circuit courts that have considered this issue have required the demonstration of an "honest" or "understandable" mistake, as set forth in the Advisory Committee's Notes. Indeed, learned commentators are in complete accord with this standard. There simply is no divergence of opinion on this issue, except for that of the Petitioners. Moreover, the valid application of Rule 17(a) takes into account that those who cannot meet the standard of proving honest and understandable mistake may

be left with a claim barred by the statute of limitations. To the extent the creditors – who are not parties to this case – are vicariously harmed, they may look to Feist and/or the Trustee who could have filed a separate action on behalf of the Estate any time prior to January 16, 1999, but chose not to do so. Finally, the courts below did not disregard established principles of collateral estoppel; Petitioners simply disagree with the result of the application of these established principles to the facts of this case. Accordingly, Petitioners have failed to articulate compelling reasons sufficient to warrant the exercise of the Court's discretionary jurisdiction.

A. The Decision Of The Third Circuit Court Of Appeals Is In Accord With Decisions Of Those United States Courts Of Appeals Which Have Articulated The Standard To Be Used In Determining Whether Substitution Is Appropriate Under Rule 17(A)

Federal Rule of Civil Procedure 17(a)[6] provides, in pertinent part, that:

> Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have

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[6] "In its origin, the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name." Fed. R. Civ. P. 17 advisory committee's note (1966). Now, the function of the rule is to "protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." *Id.*

> the same effect as if the action had been commenced in the name of the real party in interest.

Although the foregoing language clearly provides a basis for dismissal of actions not brought by the real party interest, Rule 17(a) also prevents the loss of substantial rights by permitting relation back following ratification by, or joinder or substitution of the real party in interest. The thrust of Petitioners' argument is that substitution pursuant to Rule 17(a) should be ***automatic*** in all cases.

Such an interpretation is contrary to substantial case law, assumes a litigant may use procedural rules for dishonest purposes and runs afoul of the Advisory Committee's Notes, which provide that the pertinent inquiry under Rule 17(a) is whether the plaintiff made an honest mistake in filing the action.

The Committee states:

> [t]he provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.

The examples provided by the Advisory Committee's Notes on the 1966 amendment to the Rule make it clear that honest mistake is the issue. The Committee writes:

> It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed

> the fatal flight, the victim, can be substituted to take advantage of the suspension of the limitation period.

In the foregoing examples, it is assumed that the suspension of the limitations period is a benefit to the plaintiff and corresponding prejudice to the defendant. *See Dorsey v. St. Joseph County Jail Officials*, 910 F. Supp. 1343, 1349 (N.D. Ind. 1996) (stating that the main thrust of Rule 17 is to allow a correction in parties after the statute of limitations has run), *rev'd on other grounds*, 98 F.3d 1527 (7th Cir. 1996). The real issue, therefore, is what caused the initial mispleading: honest mistake as to the identity of the true plaintiff or, as in the above examples, creative but improper lawyering?

Although the Advisory Committee's Notes are clearly germane to the proper construction of Rule 17(a), Petitioners assert that the Third Circuit's and district court's reliance on these Notes was improper. This argument is without support.

The Court has previously stated that although the Advisory Committee's Notes are "not determinative," the Notes are " 'of weight' " in the construction of a rule. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988); *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946). Petitioners ignore this body of case law focusing instead on the concurring opinion of Justice Scalia in *Tome v. United States*, 513 U.S. 150 (1995), to support their contention that "excessive reliance on the Advisory Committee Notes has sometimes been controversial in this Court" and therefore, the Third Circuit's and district court's reliance on the Notes was inappropriate. Although Justice Scalia took issue with the plurality's statement in *Tome* that the Notes display the " 'purpose' " of Federal Rule of Evidence 801(d)(1)(B), he did not advocate ignoring the Notes. To the contrary, Justice Scalia stated that:

> Having been prepared by a body of experts, the Notes are assuredly persuasive scholarly commentaries - ordinarily the most persuasive – concerning the meaning of the Rules.

Tome, 513 U.S. at 167.

Here, the Third Circuit properly looked to the Advisory Committee's Notes when construing Rule 17(a). In doing so, the Third Circuit stated that the Advisory Committee's Notes explain that substitution is "allowed only 'when an *honest* mistake has been made in choosing the party in whose name the action is to be filed. . . . [Rule 17(a)] is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an *understandable* mistake has been made.' " (App. 3-4).

Petitioners also contend that the Third Circuit's construction of Rule 17(a) is in conflict with that of other courts of appeals. However, the courts of appeals have long recognized that substitution under Rule 17(a) is dependent upon whether an understandable or honest mistake has been made. *See Roanoke Properties Ltd. Partnership v. Dewberry*, Nos. 97-1905, 97-1991, 1999 WL 1032605, at *5 (4th Cir. Nov. 15, 1999) ("[T]he language in Rule 17 . . . 'is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.' Here, the district court was well within its discretion in concluding that the decision to have RPLP sue Dewberry was not an 'understandable mistake,' but rather a purely strategic decision."); *Scheufler v. General Host Corp.*, 126 F.3d 1261, 1270 (10th Cir. 1997) (finding relation back of claims appropriate in light of the fact plaintiffs' failure to name real parties in interest as parties in the first place was due to their mistaken belief about the legal effectiveness of their assignment agreements.); *Federal Deposit Ins. Corp. v. Meyer, (In re Meyer)*, 120 F.3d 66, 68-69 (7th Cir. 1997) (stating that Rule 17 contemplates party substitution when an understandable mistake has been made);

Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 20-21 (2d Cir. 1997) ("There plainly was a mistake as to the legal effectiveness of the [assignment] documents to permit AMI to sue as assignee. However, the [trial] court did not refer to any evidence suggesting that the mistake itself was deliberate or tactical, and we have been pointed to no evidence that would indicate that the attempted assignments were undertaken in bad faith or in an effort to deceive or prejudice the defendants."); *United States v. CMA, Inc.*, 890 F.2d 1070, 1074 (9th Cir. 1989) ("The purpose of . . . Rule 17(a) is to prevent forfeiture of an action when determination of the right party to sue is difficult or when an understandable mistake has been made."); *Del Re v. Prudential Lines, Inc.*, 669 F.2d 93, 96-97 (2d Cir. 1982) (where "[n]o difficulty, confusion, or mistake ever existed in the present case regarding the identity of the party in whose name the suit must be brought," substitution pursuant to Rule 17(a) was precluded); *Garcia v. Hall*, 624 F.2d 150, 151 n.3 (10th Cir. 1980) (substitution permitted where, "[t]he failure to use [the real party in interest's] name in the first place is an understandable and excusable mistake."); *Spangler v. Pasadena City Bd. of Education, et al.*, 537 F.2d 1031, 1034 n.4 (9th Cir. 1976) (dissenting opinion) (stating that Rule 17(a) "is not applicable, however, when there is no difficulty in determining the right party to bring an action and when there has been no excusable mistake made in selecting the party."); *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413, 418-19 (8th Cir. 1967) (holding that relation back is appropriate where "[n]o fraud, forum-shopping or improper conduct on the part of the minors with respect to instituting this action is shown. . . . any mistake in bringing the action initially in the name of the administratrix is understandable and excusable.").

In support of their claim that that the Third Circuit's decision is in conflict with courts of appeals that treat substitution as "virtually automatic," Petitioners rely on

Underwriters at Interest of Cover Note v. Nautronix, Ltd., 79 F.3d 480 (5th Cir. 1996) and *Advanced Magnetics, Inc.*, 106 F.3d at 11. However, neither case conflicts with the Third Circuit's decision here.

Petitioners correctly state that the Fifth Circuit noted in *Underwriters* that "If [the original plaintiffs] were not [the real parties in interest,] then the trial court's decision to permit amendment would not only be correct but it would have been required by Rule 17." 79 F.3d at 484. However, Petitioners fail to acknowledge that the issue in *Underwriters* was not the standard applicable to substitution under Rule 17, but whether the trial court abused its discretion by permitting an amendment that "effectively dismissed [the defendant's] counterclaims." *Id.*

In *Underwriters*, insureds brought suit to recover their total "actual damages" although their insurer had reimbursed approximately ninety percent of their loss. The defendant subsequently asserted compulsory counterclaims against the insureds who then moved to dismiss the counterclaims on the basis that the insurer was the real party in interest. The insureds also moved to amend their complaint to name the insurer as the real party in interest. The insureds' motion to amend was granted and the insurer was substituted for the insureds. As a result, the defendant's compulsory counterclaims were effectively dismissed.

The defendant appealed to the Fifth Circuit contending that the district court erred when it granted the motion to amend without making any provision for the defendant's counterclaims. The Fifth Circuit agreed concluding that the district court:

> not only violated the express provisions of Fed. R. Civ. P. 41(a)(2), [which provides, in part, that if 'a counterclaim has been pleaded by a defendant . . . the action shall not be dismissed against the defendant's objection unless the

> counterclaim can remain pending for independent adjudication by the court,'] but it also unduly prejudiced [the defendant] by potentially barring it from bringing its claims in a subsequent suit. Consequently, we find that the trial court's decision to permit the amendment constituted an abuse of discretion.

Underwriters, 79 F.3d at 485. Thus, the issue in *Underwriters* clearly was not the standard for substitution under Rule 17(a), but the standard applicable to amendments that implicate Fed. R. Civ. P. 41(a)(2). Accordingly, the Third Circuit's decision in this case does not conflict with *Underwriters*.

Likewise, the Third Circuit's decision is not in conflict with the Second Circuit's decision in *Advanced Magnetics*. Although the Second Circuit did state that "the district court retains some discretion to dismiss an action where there was no semblance of any reasonable basis for naming an incorrect party," the Second Circuit then went on to note that "the [trial] court did not refer to any evidence suggesting that the mistake itself was deliberate or tactical, and we have been pointed to no evidence that would indicate that the attempted assignments were undertaken in bad faith or in an effort to deceive or prejudice the defendants." 106 F.3d at 20-21. Therefore, it is readily apparent that the Second Circuit, like the Third Circuit here, examined the evidence to determine whether an understandable mistake had been made. Accordingly, the Third Circuit's opinion is in accord with decisions of all other courts of appeals.[7]

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[7] Petitioners also claim that "Wright & Miller do not endorse engrafting an 'honest [and] understandable mistake' requirement onto the Rule's language, but do suggest that the Rule 'should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice.' "

B. The Theoretical Impact On The Chapter 7 Creditors Is Of No Consequence To The Question Of Whether Substitution Should Be Allowed Pursuant To Rule 17(A)

Rule 17(a) provides the specific and only mechanism to substitute the real party in interest for the party that initiated the action. *See Dorsey*, 910 F. Supp. at 1349. However, as discussed above, substitution is not automatic and is permitted only when determination of the right party to sue is difficult or when an honest or understandable mistake has been made. The interests of any other party – or in this case non-parties – simply have no bearing on the issue of whether substitution should be allowed under Rule 17(a).

Nonetheless, Feist and the Trustee ignore the standard for substitution under Rule 17(a) attempting to make an equitable argument that substitution should be allowed solely because of the theoretical harm to the creditors. First, this issue is not one preserved for appeal by Feist (who can hardly seek equity on behalf of the creditors), but was brought by the Trustee on appeal to the Third Circuit. (CA3 App. 763). The Trustee, having

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However, this statement misrepresents this treatise. Wright and Miller state:

> A literal interpretation of the last sentence of Rule 17(a) would make it applicable to every case in which an inappropriate plaintiff has been named. However, the rule should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice. Thus, it has been held that when determination of the right party to bring an action was not difficult and when no excusable mistake has been made, then the last sentence of Rule 17(a) was not applicable and the action should be dismissed.

6A Charles Alan Wright & Arthur R. Miller, *Federal Practice And Procedure*, § 1555 (2d ed. 1990) [hereinafter "Wright and Miller."]

failed to move for an extension of time in which to file a Petition for Writ of Certiorari, is jurisdictionally barred from raising this issue. *See, supra,* at p. 2.

Moreover, Petitioners assert that the district court did not mention the interests of the Chapter 7 creditors in being made whole through a civil recovery. (Petitioners' Brief 10). That is not so. The district court acknowledged the Trustee's argument, but relied on the case of *Oneida Motor Freight v. United Jersey Bank,* 848 F.2d 414, 422 (3d Cir. 1988) (Stapleton, J., dissenting), in rejecting this argument. In *Oneida,* a chapter 11 debtor failed to disclose a potential claim against a creditor. After the court confirmed the debtor's reorganization plan, the debtor brought the claim. The court of appeals, in affirming dismissal of the case, found that the debtor's failure to disclose its potential claim in the bankruptcy precluded a later independent action. Despite the concerns raised by the dissent that it produced a harsh result for the creditors, the court held that the debtor was not permitted to bring its claim. *Id.* at 420. Thus, the district court similarly found that the interest of Feist's creditors in recovering some of the debts owed to them was not sufficient to justify the substitution of the Trustee in this case. (App. 30).

The Third Circuit similarly rejected the Trustee's argument because, at its essence, substitution would have to be allowed in all cases in which the statute of limitations had expired. (App. 6, n.2). The court was not persuaded as such an interpretation "renders Rule 17 inoperative when the statute has run and a mere formality in cases where relation back is not required to maintain the action." (App. 6, n.2).

Finally, to the extent the creditors have been harmed, the source of their harm, other than Feist, is the Trustee. Feist filed his Chapter 7 petition on January 16, 1997. Pursuant to 11 U.S.C. § 108(a), the Trustee had two years

from that date – until January 16, 1999 – to commence suit against CF.[8] However, the Trustee chose not to do so.

C. As The Movants, Feist And The Trustee Had The Burden To Show That Feist Made An Honest Mistake When He Brought Suit In His Own Name

Eventually acknowledging that he was not the real party in interest, Feist moved pursuant to Rule 17(a) to substitute the Trustee as the real party in interest. The Trustee subsequently filed a similar motion. As the moving parties under Rule 17(a), Feist and the Trustee had to first prove that bringing this lawsuit in Feist's own name was the result of an honest mistake. *See R.L. Clark Drilling Contractors, Inc. v. Schramm, Inc.*, 835 F.2d 1306, 1308 (10th Cir. 1987) (stating that the burden of showing that manifest injustice would result "falls squarely on the moving party"). This burden was never satisfied.

Furthermore, although Feist and the Trustee contend that their burden was to eliminate doubt and not whether Feist had made an honest mistake, this misrepresents the district court's opinion. The district court never stated that the movants' *burden* was to eliminate doubt. To the contrary, the district court repeatedly and correctly held that it was the movants' burden to show an honest mistake. (App. at 19, 28, 29, 30). This was a clear preponderance standard. Although the district court did state that Feist failed to "eliminate . . . doubts," this statement

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[8] Petitioners state that Feist's mistaken initiation of the action in his own name did not create a threat to CF that it would subsequently be a party to an action by the Trustee because the bankruptcy was closed. This statement is without support. Feist filed suit against CF on July 21, 1997 just before the statute of limitations ran on his personal injury claim; however, the Trustee had until January 16, 1999 to file suit on the exact same claim. Thus, CF bore a substantial risk that it could be subject to a subsequent suit by the Trustee.

was made by the court after reviewing the timing of Feist's actions and concluding that Feist's explanation for his actions failed to eliminate in the court's mind the doubt that he had made an honest mistake. In essence, the district court was merely stating that it did not find Feist's explanatory testimony regarding his actions to be credible. The motions to substitute were denied because the facts belied the assertion that Feist had made an honest mistake when he brought the lawsuit against CF in his own name, not because the district court imposed "a nearly insurmountable burden."

In sum, there is no conflict among the circuit courts (nor the learned commentators) as to the standard imposed for the substitution of the real party in interest under Rule 17(a). The district court imposed the correct standard and found that the evidence simply did not support the proposition that Christopher Feist made an honest mistake when he filed the lawsuit against CF in his own name. The Third Circuit properly found no abuse of discretion in this judgment.

D. The Bankruptcy Court's Determination That Feist Had Not Committed Fraud Does Not Estop The District Court From Determining Whether Feist Committed An Honest Mistake When He Commenced This Action In His Own Name.

Contrary to Petitioners' assertions, this is not a case in which the courts below "disregarded this Court's long-established principle that determinations of the bankruptcy court are entitled to collateral estoppel." (Petitioners' Brief 24). Collateral estoppel did not apply in this case because Petitioners could not satisfy the elements necessary for its application. Petitioners simply do not like the result of the application of established law to the facts of this case. That, however, is not an appropriate ground for the granting of a petition for writ of certiorari.

Collateral estoppel, or issue preclusion, attaches only when the formerly adjudicated issue is identical to the one subject to estoppel, including factual identity, legal standards and the burden the litigation would impose on the parties. "If the party against whom collateral estoppel is being asserted bears a less onerous burden of proof in the second trial, then a different outcome is possible and the issue should not be treated as identical." Jack H. Friedenthal, et al., *Civil Procedure* § 14.10 (1985). In addition to identity of issues, there must be a final order, party status and a full and fair opportunity to litigate before collateral estoppel will attach. *See Baker v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998). Petitioners simply failed to satisfy these essential elements.

1. The Issues Are Not Identical

The Third Circuit held that there was no identity of issue as between the bankruptcy court's finding that "the debtor committed no fraud" in the context of reopening the bankruptcy and the district court's finding that Feist had not made an honest mistake when he filed the lawsuit in his own name some five months later. The Court held that it would not be bound:

> because a finding by the bankruptcy court that Feist had not committed fraud when he failed to list his cause of action against CF as an asset in his bankruptcy or when he told the trustee that he had no personal injury claims is not the same thing as a finding that Feist did not make an honest mistake in filing the action in his own name. We note that this action was filed on July 21, 1997, significantly after the events considered by the bankruptcy court, as the bankruptcy filing took place on January 3, 1997, and the meeting with the trustee took place on February 24, 1997. Thus, the bankruptcy court's finding

> that Feist had "committed no fraud" has no preclusive effect here.

(App. 5-6). The Court clearly found no factual identity of issues.

Petitioners actually admit that the question of Feist's knowledge and intent in January and February 1997 vis a vis his potential claim against CF is not literally "the same thing" as his knowledge in July 1997 whether he had a right to sue on that claim in his own name, after being discharged from bankruptcy months before. But Petitioners claim that "the former is highly relevant to the latter." (Petitioners' Brief 24-25).

Yet, collateral estoppel attaches only when the formerly adjudicated issue is *identical* to the one subject to estoppel, including factual identity, legal standards and the burden the litigation would impose on the parties. The requirement that issues be identical is construed strictly. The doctrine "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948).

Moreover, "if the party against whom collateral estoppel is being asserted bears a less onerous burden of proof in the second trial, then a different outcome is possible and the issue should not be treated as identical." Jack H. Friedenthal, *et al., Civil Procedure* § 14.10 (1985). In this instance, there was a different legal standard and burden of proof at issue in the subsequent matter.

In considering the Trustee's application to reopen the bankruptcy, Judge Scholl determined that Feist did not commit fraud when he omitted his personal injury claim from his bankruptcy schedule of assets. (App. 12). Under Rule 17(a), the inquiry is not whether Feist committed fraud, but whether the determination of the right party to sue was difficult or whether *an honest mistake* has been

made. Fed. R. Civ. P. 17 Advisory Committee's Note (1966); Wright and Miller at § 1555. Thus, CF bore a more onerous burden of proof at the first proceeding on the issue of whether Feist committed the intentional act of fraud than it did before the district court where it essentially had to disprove "honest mistake" by a preponderance of the evidence. Therefore, aside from factual dissimilarity, Judge Scholl's determination that Feist did not commit fraud was not binding with regard to the issue before the district court because CF bore a less onerous burden of proof under different legal rules.

2. The Bankruptcy Court's Decision Is Not A Final Judgment On The Merits

Judge Scholl's finding also has no preclusive effect because it was not a final judgment on the merits. The well-known treatise *Collier On Bankruptcy* states, "[i]t does not appear that an order permitting the case to be reopened is final and appealable until such time as the substantive matter sought to be resolved is concluded by entry of a final order." *Collier On Bankruptcy* ¶ 5010.01 (Laurence P. Ringed. 7th ed. 2000). An order reopening a case does not, by itself, give substantive relief. *See id.* (*citing Leach v. Buckingham* (*In re Leach*), 194 B.R. 812 (E.D. Mich. 1996) (*quoting In re David*, 106 B.R. 126, 128 (E.D. Mich. 1989) "[T]he reopening of a case is of no independent legal significance or consequence. . . . The effect of this statute [11 U.S.C. § 350(b)] is merely to resurrect the court file from the stacks of the closed cases, or even from the archives, to enable it to receive a new request for relief.")); *Stackhouse v. Plumlee* (*In re Plumlee*), 236 B.R. 606, 609-10 (E.D. Va. 1999) ("courts do not regard an order reopening a debtor's estate as a final determination

adverse to any party") (citing decisions from the Second, Eighth and Ninth Circuits).[9]

In this case, the decision to reopen the bankruptcy to administer the personal injury claim does not provide substantive relief, but merely provides a mechanism for relief to be requested in the future; i.e., for the trustee to administer the personal injury claim and distribute any value obtained from it to satisfy the creditors' claims. The reopening of the bankruptcy proceeding does not change claims that are allowed or disallowed against Feist, nor does it pose a threat of irreparable harm to the creditors' interests by disposing of assets. *See In re Darby Supermarket, Inc.*, 94 B.R. 54, 55 (E.D. Pa. 1988). It does not dispose of a "discrete dispute within the larger case," such as the sale of a property or resolution of a particular tort claim. *See In re Gracey*, 80 B.R. 675, 677 (E.D. Pa. 1987), *aff'd*, 849 F.2d 601 (3d Cir. 1988). It does not resolve the litigation, decide the merits, determine the rights of parties, or establish damages. *See id.* (*citing Callister v. Ingersoll-Rand Financial Corp.*, 673 F.2d 305 (10th Cir.

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[9] Although Feist cites a number of cases which discuss how to determine the finality of an order issued by a bankruptcy court, Feist ignores the relevant case law which holds that an order which only reopens an estate is *not* a final determination. The one case Petitioners cite in support of this argument, *Irvin v. Lincoln Heritage Life Ins. Co. (In re Irvin)*, 950 F.2d 1318 (7th Cir. 1991), is readily distinguishable as the order at issue in that case both reopened the bankruptcy *and* set aside the sale of an asset of the bankruptcy estate. *Id.* at 1318-19. Although the Seventh Circuit held that the order was final, the Seventh Circuit stated that its determination was necessary because if the order was not reviewable, "any resale of the asset would be in considerable doubt." *Id.* at 1319. However, the Seventh Circuit expressly limited its holding by stating that the "order reopening the bankruptcy proceeding and setting aside the sale [was] a final order [under] *these circumstances*. *Id.* (emphasis added).

1982)). All it does is provide a forum; not substantive relief.

For these reasons, the order reopening bankruptcy proceedings against Feist is not final or appealable and does not support a collateral estoppel argument.

3. CF Was Not A Party To The Bankruptcy Proceeding

CF filed an opposition to the Trustee's Motion to Reopen the Bankruptcy Proceedings. CF was heard on that motion and Judge Scholl ruled in favor of the Trustee. That does not make CF a *party* to the bankruptcy proceedings for the reason that CF is neither the debtor nor a creditor of Feist.

In response to this indisputable fact, Petitioners argue that this Court held in *Montana v. United States*, 440 U.S. 147 (1979), that collateral estoppel or issue preclusion "bind[s] non-parties who have had 'a full and fair opportunity to litigate' . . . matters 'in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved.' " This argument, however, misstates this Court's holding. In *Montana*, this Court held that collateral estoppel applies "when nonparties *assume control* over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." 440 U.S. at 154 (emphasis added). For example, the United States, the party against whom the doctrine of collateral estoppel was asserted, exercised control over the prior litigation by (1) requiring the lawsuit to be filed; (2) reviewing and approving the complaint; (3) paying the attorneys' fees and costs; (4) directing that an appeal be taken; (5) participating in the appeal as an amicus; (6) directing that a notice of appeal be filed with this Court; and (7) effecting the abandonment of the appeal to this Court. *See id.* at 155. Here, it cannot be said that CF in any way assumed

control over the Trustee's efforts to reopen Feist's bankruptcy when it simply opposed the reopening. Thus, the Court's holding in *Montana* is not applicable.

CONCLUSION

For the reasons stated in the foregoing paragraphs, Respondent Consolidated Freightways Corp., t/a CF Motor Freight maintains there are no grounds presented in the Petition warranting the exercise of the Court's discretionary jurisdiction and respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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February 12, 2001

No. A-

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER M. FEIST, Petitioner

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION
t/a CF MOTOR FREIGHT, Respondent

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE DAVID SOUTER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Pursuant to this Court's Rules 13.5 and 30.2, applicant Christopher Feist prays for a 90-day extension of time to file his petition for a writ of certiorari in this Court to and including January 22, 2001.

1. Timeliness and Jurisdiction. The judgment of the United States Court of Appeals for the Third Circuit denying plaintiffs appeal from the order of dismissal of the Lower Court was filed and entered on May 10, 2000, a copy of which is attached hereto as Exhibit "A". A timely petition for rehearing was denied by Order dated August 10, 2000, a copy of which is attached hereto as Exhibit "B". As a result, a petition for certiorari would be due, pursuant to this Court's Rules 13.1, 13.3 and 30.1, on or before November 8,

2000. This application is being filed at least ten (10) days before that date. *See* Rule 30.2. The jurisdiction of this Court is to be invoked under 28 U.S.C. Section 1254(1).

2. Opinions Below. The Third Circuit's Memorandum Opinion (Nygaard, Alito and Gibson, Circuit Judges) was filed May 10, 2000. A copy is attached hereto as Exhibit "A". The district court's unpublished Memorandum and Order dated and filed March 31, 1999, dismissing plaintiff's case is attached hereto as Exhibit "C".

3. Reasons for Granting the Extension.

   a. The applicant was involved in an accident at work in the course of a delivery of a 350 pound pallet by defendant Consolidated Freightways on August 23, 1995. Plaintiff alleges that the pallet was unloaded on top of him thereby compressing his spine resulting in permanent and complete disability.

   b. On January 3, 1997, applicant filed a Chapter 7 Bankruptcy Petition which did not list a potential lawsuit against Consolidated Freightways as a contingent unliquidated claim on the Schedule of Assets. The applicant has testified in the past that he was under the impression that workers compensation was his only remedy and did not understand that he had a claim against any third parties at the time he filed the bankruptcy petition. The applicant was discharged from bankruptcy on April 30, 1997.

   c. The applicant initiated suit against Consolidated Freightways on July 21, 1997 in his name alone.

d. On June 1, 1998, Consolidated Freightways raised the issue of the applicant's prior bankruptcy by way of Motion for Judgment on the Pleadings claiming that the applicant lacked standing to pursue the action, The applicant responded by asserting that the problem was not one of standing but whether or not the real party in interest had been joined and requested leave for a reasonable time to join the bankruptcy trustee as the real party in interest pursuant to Federal Rule of Civil Procedure 17(A).

e. The applicant contacted the former trustee who petitioned the bankruptcy court to reopen the bankruptcy estate. Consolidated Freightways opposed the former trustee's petition to reopen the bankruptcy estate under Section 350(b) of the Bankruptcy Code claiming that the applicant defrauded his creditors by not listing the contingent unliquidated claim on his Schedule of Assets.

f. A full evidentiary hearing was held by the bankruptcy court on June 18, 1998 at which time Consolidated Freightways was given an opportunity to present evidence and argue its objections that the applicant had engaged in a fraud.

g. The bankruptcy court found in its written order that "after a full hearing of this date that the debtor committed no fraud and that the objections of Consolidated Freightways are self serving and lack merit." Accordingly, the order of the bankruptcy court reopened the bankruptcy estate and the former trustee was reappointed for the purpose of joining the litigation with Consolidated Freightways

as the real party in interest. The order of the bankruptcy court of June 18, 1998 is attached hereto as Exhibit "D".

h. The District Court held a status conference on June 25, 1998, wherein Consolidated Freightways argued that the applicant's actions were not the result of an honest mistake and therefore Federal Rule of Civil Procedure 17(A), allowing the joinder of the real party in interest, should not be applied. At that point, the District Court decided to allow discovery and subsequently hold a hearing on the issue of whether or not the applicant was acting in "good faith when he started the lawsuit in his own name".

i. On October 18, 1998, the petitioner filed a Motion for Summary Judgment with respect to the issue of the applicant's intend [sic] on filing the suit in his name alone raising the issue of the preclusive effects of the bankruptcy court's prior ruling and arguing that the court should grant the applicant's motion to substitute the bankruptcy trustee since there could no longer be a factual dispute as to the applicant's intentions.

j. On November 13, 1998, the District Court denied the applicant's Motion for Summary Judgment but did not file a memorandum or opinion in support of that order.

k. On November 19, 1998, the District Court held a hearing to determine whether or not the applicant acted in "good faith when he filed this suit in his own name."

l. On March 31, 1999, the District Court issued an order and opinion granting Consolidated

Freightway's Motion for Judgment on the Pleadings and denying the applicant's Motion to Substitute the Bankruptcy Trustee as a Real Party in Interest stating that the applicant had failed to "eliminate doubt" that he acted in bad faith when filing the suit in his own name. A copy of the District Court's Order and Opinion is attached hereto as Exhibit "C".

m. The applicant filed a timely appeal to the Third Circuit Court of Appeals raising the issues of the preclusive effect of the bankruptcy court's order as well as whether or not the District Court had abused its discretion by imposing on plaintiff the burden to "eliminate doubt" that he acted in bad faith when he filed suit in his own name in the context of Federal Rule of Civil Procedure 17(A).

n. In the undersigned counsel's professional opinion, this case presents issues which are worthy of presentation to this Court in a petition for writ of certiorari. Counsel anticipates that the petition will present one or both of the following questions:

(i) Whether the bankruptcy court's findings in reopening the bankruptcy estate under Section 350(b) of the Bankruptcy Code that the applicant "had committed no fraud" has a preclusive effect on the District Court when deciding a motion under Federal Rule of Civil Procedure 17(A) to substitute the real party in interest where the sole issue is the applicant's intent at the time of bringing the suit.

The Third Circuit's finding that the issue presented to the Bankruptcy Court under Section 350(b) of the Bankruptcy Code is not identical to the issue presented under Fed. R. Civ.P. 17(a) is contrary to this Court's holdings in *Lyte v. Household Mfg. Inc.*, 494 U.S. 559, 110 S.Ct. 1331 (1990) and *Montana v. U.S.*, 440 U.S. 147, 99 S.Ct. 970 (1979).

(ii) Whether the District Court abused its discretion by imposing upon the applicant the burden to "eliminate doubt" that he acted in bad faith when filing the suit in his own name in order to cure the real party in interest defect under Fed. R. Civ.P. 17(a).

This Court has never opined on the standard to be applied when deciding a motion under Federal Rule of Civil Procedure 17(a). Similarly, the Third Circuit has only stated that the standard to substitute the real party in interest is analogous to a Rule 15 Motion to Amend the Complaint to Add a defendant. *Nelson v. County of Allegheny*, 60 F.3d. [sic] 1010 N. 8 (31 Cir. 1995). If the Third Circuit correctly analogizes Rule 17(a) with Rule 15, the District Court's Order is in conflict with this Court's holding in *Foman v. Davis*, 371 U.S. 178 (1962), which allows amendments of pleadings amendment liberally and in the absence of "apparent" bad faith. *Id.* at 182.

o. As should be apparent from the foregoing, counsel has done considerable work to get ready to file the petition. Nevertheless counsel will not be able to complete the work on this petition prior to the November 8, 2000 deadline. In particular, counsel has four (4)

trials scheduled between the instant date and November 8, 2000 as well as numerous deadlines for filings of pleadings, motions and appeals. After November 8, 2000, counsel had numerous other trials scheduled. No party nor the public interest will be prejudiced by allowing the extension of time to petition this Court for a writ of certiorari.

WHEREFORE, the applicant/petitioner prays that an Order be entered extending the time within which he may petition this Court for certiorari by ninety (90) ninety days to and including January 22, 2001.

Respectfully submitted,

NEIL E. JOKELSON & ASSOCIATES, P.C.

BY: /s/ Illegible
NEIL E. JOKELSON, ESQUIRE

EXHIBIT A

UNREPORTED / NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1348 and 99-1349

CHRISTOPHER M. FEIST,
Appellant

v.

CONSOLIDATED FREIGHTWAYS CORPORATION
t/a CF MOTOR FREIGHT

ANDREW N. SCHWARTZ, TRUSTEE

CHRISTOPHER M. FEIST

v.

CONSOLIDATED FREIGHTWAYS
t/a CF MOTOR FREIGHT

ANDREW N. SCHWARTZ, TRUSTEE
Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

(Dist. Court No. 97-cv-04719)
District Court Judge: Robert F. Kelly

Submitted Under Third Circuit LAR 34.1(a)
April 11, 2000

Before: NYGAARD, ALITO, and GIBSON,* *Circuit Judges.*

(Opinion Filed: May 10, 2000)

MEMORANDUM OPINION OF THE COURT

ALITO, *Circuit Judge*:

Christopher M. Feist appeals the order of the District Court granting judgment on the pleadings for defendant Consolidated Freightways ("CF") in Feist's personal injury action against CF. The District Court held that Feist was not the real party in interest in the lawsuit and that the real party in interest, Feist's bankruptcy estate, could not be substituted under Fed. R. Civ. P. 17(a) because Feist had not made an honest mistake in bringing the action in his own name. We affirm.

Feist brought suit against CF, alleging that CF delivered a loaded pallet to Feist's employer in 1995 and that he was injured during the delivery. Several years before his loading dock accident, Feist had incurred debts of approximately $145,000. Feist had stopped making payments on the "vast majority" of this debt two years before the accident, and it was still outstanding at the time of the accident. App. at 161, 163. Feist filed for bankruptcy in January 1997. He did not list his cause of action against

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* The Honorable John R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

CF as one of his assets, and he told the trustee that he had no personal injury claims, although he did say that he was collecting worker's compensation. *See* App. at 688. Feist's debts were completely discharged in April 1997. In May, Feist began to consult with attorneys about a personal injury action against CF, and this lawsuit was filed in July.

Upon learning of the bankruptcy, CF alerted the District Court and pointed out that Feist's cause of action against CF had accrued before the bankruptcy filing. Thus, CF asserted that the bankruptcy estate was the real party in interest. After CF brought Feist's bankruptcy to the District Court's attention, the Court determined that Feist was not the real party in interest and that the real party could not be substituted because Feist had not made an honest mistake when he filed the action in his own name. *See* Br. of Appellant Christopher Feist, Op. of Dist. Ct. at 19 (hereinafter Op.).

Dismissal pursuant to Rule 17 is reviewed for abuse of discretion. *See Icon Group, Inc. v. Mahogany Run Dev. Corp.*, 829 F.2d 473, 476 (3d Cir. 1987). Although Rule 17 states that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for . . . substitution of . . . the real party in interest," Fed. R. Civ. P. 17(a), substitution is not a matter of right. As the Advisory Committee Notes to the 1966 Amendment of the rule explain, substitution is allowed only

> when an *honest* mistake has been made in choosing the party in whose name the action is to be filed. . . . The provision should not be misunderstood or distorted. It is intended to prevent

> forfeiture when determination of the proper party to sue is difficult or when an *understandable* mistake has been made.

Fed. R. Civ. P. 17, Advisory Committee Notes to the 1966 Amendment (emphasis added); *see also* 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1555, at 412 (2d ed. 1990) ("The final sentence in Rule 17(a) is designed to avoid forfeiture and injustice when an *understandable* mistake has been made in selecting the party in whose name the action should be brought.") (emphasis added); 4 Richard D. Freer, *Moore's Federal Practice* § 17.12[1][a], at 17-55 to -56 (3d ed. 1999) ("This provision 'is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an *understandable* mistake has been made.' ") (quoting the Advisory Committee Note, emphasis added).

Feist's bankruptcy was closed on May 7, 1997. On May 30, 1997, he hired counsel to bring his cause of action against CF. At his deposition, he refused to testify whether he told his counsel about the bankruptcy case. The District Court held that "[t]he aggressiveness with which [Feist] pursued this litigation immediately after his bankruptcy case was closed . . . raises questions about Plaintiff's intent." Op. at 13. The Court noted that while Feist consulted four attorneys immediately after the bankruptcy closed, he had not consulted any attorneys in 20 months between the injury and the bankruptcy discharge. *See id.* The Court found Feist's explanations for the delay in filing the action to be inconsistent. The Court contrasted Feist's testimony in his first deposition – that although he always believed CF was responsible for his injury, he delayed in suing CF because he did not want to

"go after anybody," App. at 838a – with his direct testimony to the District Court, in which Feist said that he was "very surprised" by his uncle's suggestion that he sue CF, *see* App. at 975a. The District Court held that Feist had not shown that he made an honest mistake when he filed the action in his own name:

> Evaluating all of the evidence presented, it is clear that Plaintiff has not sustained his burden of proving that when he filed this action in his own name, he did so in good faith. Plaintiff's lack of interest in filing a petition in bankruptcy for several years until after he had acquired what he believed was a significant asset makes his stated intentions apepar dubious. His subsequent failure to list this claim as an asset in his bankruptcy petition further adds to suspicions about his motivation. Moreover, Plaintiff began an aggressive search for an attorney immediately after his bankruptcy case was closed. The timing of these actions by Plaintiff certainly gives the Court reason to doubt that when he finally did bring this action in his own name, he did so as the result of an honest mistake.

Op. at 16-17. Under these circumstances, we cannot say that the District Court abused its discretion.[1] We also

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[1] Feist asserts that since the order of the bankruptcy court stated "that the debtor committed no fraud," App. at 368, the District Court is estopped from finding that Feist did not make an honest mistake in filing the action in his own name. However, even if the bankruptcy court were required to find that Feist had "committed no fraud" before reopening Feist's bankruptcy case under 11 U.S.C. § 350(b), it would not be binding on us because a finding by the bankruptcy court that Feist had not committed fraud when he failed to list his cause of

hold that Feist's argument that the trustee must be substituted in this action to avoid injustice is without merit.[2] Accordingly, we affirm the order of the District Court granting judgment on the pleadings to CF.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

May 10, 2000 /s/ [Illegible]
Circuit Judge

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action against CF as an asset in his bankruptcy or when he told the trustee that he had no personal injury claims is not the same thing as a finding that Feist did not make an honest mistake in filing the action in his own name. We note that this action was filed on July 21, 1997, significantly after the events considered by the bankruptcy court, as the bankruptcy filing took place on January 3, 1997, and the meeting with the trustee took place on February 24, 1997. Thus, the bankruptcy court's finding that Feist had "committed no fraud" has no preclusive effect here.

[2] Feist contends that forbidding substitution would be unjust because the trustee will be barred from bringing the action in his own name, as the statute of limitations has run. Under this interpretation of injustice, substitution would have to be allowed in all cases in which the statute of limitations had expired. We find this interpretation unpersuasive, as it renders Rule 17 inoperative when the statute has run and a mere formality in cases where relation back is not required to maintain the action.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1348 and 99-1349

CHRISTOPHER M. FEIST,

Appellant

v.

CONSOLIDATED FREIGHTWAYS CORPORATION
t/a CF MOTOR FREIGHT

ANDREW N. SCHWARTZ, TRUSTEE

CHRISTOPHER M. FEIST

v.

CONSOLIDATED FREIGHTWAYS
t/a CF MOTOR FREIGHT

ANDREW N. SCHWARTZ, TRUSTEE

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICTCOURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

(Dist. Court No. 97-cv-04719)
District Court Judge: Robert F. Kelly

Submitted Under Third Circuit LAR 34.1(a)
April 11, 2000

Before: NYGAARD, ALITO, and GIBSON,* *Circuit Judges.*

(Opinion Filed: May 10, 2000)

JUDGMENT

This cause name to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on April 11, 2000.

After careful review and consideration of all contentions raised by the appellant, it is hereby ORDERED that the order of the District Court entered on March 31, 1999, be and is hereby affirmed.

Cost taxed against the appellants.

ATTEST:

/s/ Marcia M. Waldron
Acting Clerk

DATED: May 10, 2000

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* The Honorable John R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1348 and 99-1349

CHRISTOPHER M. FEIST,

Appellant

v.

CONSOLIDATED FREIGHTWAYS CORPORATION
t/a CF MOTOR FREIGHT

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, GREENBERG, SCIRICA, NYGAARD, ALITO, ROGH, McKEE, BARRY, and FUENTES *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Illegible
Circuit Judge

DATED: AUG 10 2000

CB/CC: RDH
DEJ
AWA
MKB
DBF
TRC
JEO

EXHIBIT C
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER M. FEIST, Plaintiff, v. CONSOLIDATED FREIGHTWAYS CORPORATION t/a CF Motor Freight, Defendant.	CIVIL ACTION No. 97-4719 (Filed Mar. 31, 1999)

MEMORANDUM

ROBERT F. KELLY, J. MARCH 31, 1999

This is an action for personal injuries alleged to have been sustained by the Plaintiff. It was proceeding to trial in the ordinary course when Defendant, Consolidated Freightways, discovered that Plaintiff brought this action, in his own name, after having filed a petition in bankruptcy. The Defendant has filed a Motion to Dismiss contending that the Plaintiff is not the real party in interest. Plaintiff has filed a Motion to Substitute the Real Party in Interest, The Trustee in Bankruptcy.

A. THE EFFECT OF PLAINTIFF'S BANKRUPTCY.

The filing of a bankruptcy petition creates an estate that generally includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Any causes of action that accrue to the debtor prior to the filing of the bankruptcy petition are property interests included in the estate. *Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F.3d 487, 491 (3d Cir. 1997); *Cain v. Hyatt*, 101 B.R. 440, 441-42 (E.D. Pa. 1989). A cause of action need not be formally filed prior to the commencement of a bankruptcy case to become property of the estate. *Lawrence v. Jackson Mack Sales, Inc.*, 837 F. Supp. 771, 779 (S.D. Miss. 1992), *aff'd*, 42 F.3d 642 (5th Cir. 1994). After a claim becomes part of the bankruptcy estate, only the bankruptcy trustee, as representative of the estate, has the authority to prosecute or settle the cause of action. *Chrysler Credit Corp. v. B.J.M., Jr., Inc.*, 834 F. Supp. 813, 839 (E.D. Pa. 1993); *Cain*, 101 B.R. at 442.

There is no dispute in this case that Plaintiff's claim against Defendant accrued prior to the filing of his bankruptcy petition. When Plaintiff commenced his bankruptcy case, this claim became the property of the bankruptcy estate. Therefore, any claim by Plaintiff against Defendant arising out of the incident that took place on August 23, 1995, no longer belongs to Plaintiff. Rather, it is the property of the bankruptcy estate.

In its Motion for Judgment on the Pleadings, Defendant first argued that this suit should be dismissed because of Plaintiff's apparent lack of standing. While there is much confusion surrounding the distinction between the doctrine of standing and the principle of the real party in interest, it is clear that this suit presents an issue involving the latter.

Generally, standing involves a determination of "whether the plaintiff can show an injury in fact traceable to the conduct of the defendant." *Firestone v. Galbreath*, 976 F.2d 279, 283 (6th Cir. 1992) (citing *Allen v. Wright*, 468 U.S. 737 (1984)). Because Plaintiff was the individual who suffered the injury alleged in the Complaint, he meets the requirements of standing. In contrast, the real party in interest principle requires that "Every action shall be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a). This principle is a means to identify the person who possesses the right sought to be enforced. *Firestone*, 976 F.2d at 283. Plaintiff is not the real party in interest because, upon the filing of his bankruptcy petition, this claim became the property of the bankruptcy estate and now can only be maintained by the bankruptcy trustee. *See Lawrence*, 837 F. Supp. at 779.

B. RULE 17(a).

In addition to requiring all actions to be prosecuted in the name of the real party in interest, Rule 17(a) provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

FED. R. CIV. P. 17(a). While a literal interpretation of this portion of Rule 17(a) would make it applicable to every case in which an inappropriate plaintiff was named, the Advisory Committee's Notes make it clear that this provision "is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made."[1] FED. R. CIV. P. 17 Advisory Committee Notes, 1966 Amendment; *see also Nelson v. County of Allegheny*, 60 F.3d 1010, 1015 n.8 (3d Cir. 1995); *United States ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1074 (9th Cir. 1989); *Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176, 180 (W.D. La. 1970). When determination of the correct party to bring the action was not difficult and when no excusable mistake was made, the last sentence of Rule 17(a) is inapplicable and the action

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[1] For a further discussion of the necessity of an honest mistake in order for a court to permit substitution under Rule 17(a), see Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 Geo. L.J. 1204, 1238 (1966).

should be dismissed. 6A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1555 (1990) ("Wright & Miller"); *see also Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997) (noting that the district court retains discretion to dismiss an action where there was no reasonable basis for naming an incorrect party); *Whitcomb v. Ford Motor Co.*, 79 F.R.D. 244, 245 (M.D. Pa. 1978) (noting that Rule 17 contemplates dismissal of an action not prosecuted by the real party in interest). Further, this portion of Rule 17(a) "should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice." 6A Wright & Miller § 1555; *Automated Info. Processing, Inc. v. Genesys Solutions Group, Inc.*, 164 F.R.D. 1, 3 (E.D. N.Y. 1995).

Based upon this analysis, it is evident that Rule 17(a) should not be applied blindly to permit substitution of the real party in interest in every case. In order to substitute the trustee as the real party in interest, Plaintiff must first establish that when he brought this action in his own name, he did so as the result of an honest and understandable mistake. The Advisory Committee Notes to Rule 17(a) provide examples of situations in which substitution would not be permissible:

> [This provision] does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension

> of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period.

FED. R. CIV. P. 17 Advisory Committee Notes, 1966 Amendment. Therefore, it is necessary for this Court to determine whether or not Plaintiff was acting in good faith when he filed this action in his own name. If Plaintiff did not make an honest and understandable mistake when he filed this action in his own name, this Court will not allow substitution of the real party in interest.

C. FACTUAL BACKGROUND.

On August 23, 1995, Plaintiff was at his place of employment, Jay Telephone Vending, Inc. While assisting in the unloading of freight delivered by Defendant, Plaintiff allegedly sustained severe injuries. Two to three hours later, Plaintiff went home because he was in pain. After spending four days in bed, he sought medical attention. Plaintiff never returned to work, and he began receiving worker's compensation several months later.

On July 21, 1997, Plaintiff filed a complaint against Defendant based upon the injuries he sustained on August 23, 1995. Trial was set to commence on July 6, 1998. During May of 1998, Defendant became aware that Plaintiff had filed a petition in bankruptcy during 1997. On June 3, 1998, this Court granted Defendant leave to

engage in limited discovery on this new issue. This discovery revealed that on January 16, 1997, nearly one year and five months after his injury, Plaintiff filed a Chapter 7 Petition in Bankruptcy. In his petition, Plaintiff listed 82 creditors holding unsecured non-priority claims in the amount of $155,887.54. The petition further disclosed personal property in the amount of $6,125.00. Plaintiff did not, as was required, list his claim against Consolidated Freightways in his bankruptcy petition. Further, when asked by the trustee at the meeting of creditors whether he had "any claims against anyone for any reason whatsoever," Plaintiff replied "nothing." (*See* Pl.'s Post Hr'g Br. Ex. 6 at p. 13.) On April 30, 1997, Plaintiff received a discharge of all of his debts, and his bankruptcy case was closed on May 9, 1997.

Plaintiff immediately sought an attorney to pursue any possible claim he might have against Defendant. In the weeks following the discharge of his debts, Plaintiff contacted four attorneys with respect to this claim. In the second or third week of May, 1997, Plaintiff contacted the attorneys who represented him just prior to trial ("trial counsel"). Trial counsel was retained on May 30, 1997.

At a deposition, Plaintiff testified that after his bankruptcy discharge, but prior to retaining trial counsel, he met with the three other attorneys to discuss possible claims against Defendant in this action. He further testified that he never informed any of the three attorneys that he had recently filed a bankruptcy petition.[2] (Dep. of Christopher Feist, 6/12/98, at pp. 112-35.) When asked

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[2] At the deposition, Feist also discussed his communications with his bankruptcy attorney. (Dep. of Christopher Feist, 6/12/98, at pp. 69-88.)

whether he had informed any attorney from the trial counsel firm of his bankruptcy, Plaintiff asserted the attorney-client privilege and refused to answer. (*Id.* at pp. 126-27.) Similarly, at the deposition of trial counsel, Plaintiff (through other counsel) again asserted the attorney-client privilege when his trial counsel was asked if Plaintiff had ever informed him of the bankruptcy petition.[3] (Dep. of trial counsel at pp. 22-26.)

Plaintiff gave various reasons at his depositions and at the evidentiary hearing as to why he waited until nearly two years after the date of his accident to see an attorney. When asked at his first deposition why he decided to see an attorney in May of 1997, Plaintiff responded that it was because he "got to a point of just utter frustration and realizing I wasn't getting better and the doctors weren't able to do anything for me and I just realized that my life could be like this for as long as I'm alive." (Dep. of Christopher Feist, 3/18/98, at pp. 143-44.) At his later deposition, Plaintiff testified that he did not pursue a claim against Defendant sooner because "[t]he whole concept of having a claim against Consolidated Freightways didn't even enter my mind at that point." (Dep. of Christopher Feist, 6/12/98, at p. 93.) At the hearing, Plaintiff testified "I had no idea I could sue anybody. I mean, first of all, that wasn't my main focus, and secondly, I just thought I was receiving workers' comp and that was my rights, that was it." (N.T. 11/19/98 at pp. 25-26.)

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[3] The Court was never asked to rule on these claims of attorney-client privilege.

D. DISCUSSION.

In evaluating the evidence relevant to the issue of whether or not Plaintiff filed this Complaint in good faith, the timing of particular events plays a crucial role. Plaintiff incurred the majority of his debt prior to 1994. While his Chapter 7 petition filed in 1997 lists claims in excess of $155,000.00, more than $145,000.00 of that amount was incurred in 1993 or earlier. It is remarkable that, given this substantial amount of debt, Plaintiff waited until 1997 to file his bankruptcy petition.

When asked what led him to file the bankruptcy petition, Plaintiff testified at his deposition: "Well, I had planned on maybe applying for relief under the bankruptcy law for a couple of years before this. . . . I kept putting it off because I thought maybe some how, some way, I'd get things together and be able to take care of it." (Dep. of Christopher Feist, 6/12/98, at pp. 10-11.) At the evidentiary hearing, Plaintiff's counsel argued:

> If Mr. Feist wanted to get rid of his creditors from '91 to '93, and if it only takes four, five months to get rid of them, he would have gone and filed the bankruptcy in 1993 or 1994 or 1995, and there never would have been a creditor problem later. Instead what he did was the other thing. He tried to pay them.

(N.T. 11/19/98 at p. 112.) Thus, Plaintiff contends that despite the fact that the vast majority of his debt was incurred prior to 1994, he delayed filing bankruptcy until 1997 because he was attempting to repay his creditors.

But Plaintiff's own testimony casts doubt upon this purported reason for the delay. At his deposition, Plaintiff testified that he had stopped making payments to the vast majority of his creditors in 1992 or 1993. (Dep. of Christopher Feist, 6/12/98, at p. 29.) Plaintiff shed further light upon his intentions regarding his debts when he was asked if he had notified his creditors of a change in his address:

> Q: I guess what I want to know, though, Mr. Feist, is to the extent the creditors were corresponding with you in Vegas, at some point you left Vegas and you moved back home to Philadelphia. Did you notify those creditors so that they could continue to correspond with you in Philadelphia?
>
> A: Well, by that time I had already talked to my creditors and told them that I can't pay the debts.
>
> Q: So is the answer no, that you didn't notify them?
>
> A: I don't recall if I did or not, because I never actually changed anything beyond talking to them and telling them I couldn't pay the debts. Mostly all of them got in touch with me.
>
> Q: I'm sure they did.
>
> A: And I told them all the same thing. I can't pay the debts.
>
> Q: And this would be in 1992-'93?
>
> A: And I told them to stop calling me and harassing me, things of that nature. And by law, they had to stop doing that.

(*Id.* at pp. 38-39.) Based upon his own testimony, Plaintiff did not notify his creditors that he had moved to Philadelphia.[4] Indeed, he had informed his creditors that he was unable to repay them. It seems rather unlikely, then, that Plaintiff intended to repay his creditors when he had already informed them that he would not pay his debts and had failed to notify them of his change of address. Further, the fact that Plaintiff told his creditors to stop calling him because he knew that "by law, they had to stop doing that" shows a certain amount of sophistication on his part regarding management of his debts.

Thus, it is doubtful that Plaintiff delayed his bankruptcy petition because he was attempting to repay his creditors. It is more likely that Plaintiff never previously

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[4] Plaintiff actually testified that the word "move" did not accurately describe the way in which he was "predominantly spending a lot of time in Philadelphia" beginning in August, September, or October of 1993. (*See* Dep. of Christopher Feist, 6/12/98, at pp. 32, 40.) Rather, he maintained that he was perpetually transient, alternately or simultaneously living in Las Vegas, Salt Lake City, and Philadelphia:

> Q: Where was your residence at that point in time, spring of '92?
>
> A: What do you mean my residence?
>
> Q: Where you were living, where you could vote.
>
> A: Well, I didn't vote during those years, because my main residence is in Pennsylvania. I went out there [Las Vegas and Salt Lake City] to do some business. And when I was out there, I stayed in different places. I had a place, you know, that I stayed in Vegas. I had a place that I stayed in Utah. And I had a place that I stayed in Pennsylvania.

(*Id.* at p. 36.)

filed for bankruptcy because he had no assets to protect. When he was injured on August 23, 1995, Plaintiff acquired what he believed was a valuable asset – his claim against Defendant. Despite any previous occasions on which Plaintiff considered filing a bankruptcy petition, it was only after his acquisition of this asset that he actually sought relief in bankruptcy court.

The aggressiveness with which he pursued this litigation immediately after his bankruptcy case was closed also raises questions about Plaintiff's intent. Plaintiff testified that within the three weeks following the close of his bankruptcy case he spoke with four different attorneys regarding a possible claim against Defendant. Within just a few weeks he had retained counsel and filed a lawsuit. In contrast, during the first one year and eight months following his injury, he did not speak with a single attorney regarding potential claims against Defendant. It was only after his substantial debts were discharged by the bankruptcy court that Plaintiff actively pursued this claim.

The questions that are naturally raised by the swiftness with which Plaintiff sought legal representation after his bankruptcy case was closed are not fully answered by Plaintiff's testimony. When asked at his first deposition what led him to seek an attorney, Plaintiff testified:

> A: Well, it was mostly the fact what that guy did that day with the trucking company, the whole way he orchestrated what we were going to do, how we were going to do it, how much of a hurry he was in. . . .

> Q: I understand what you're saying and your reasons for pursuing the claim. I guess my question goes to the timing of it. Why in May of '97 were you making that decision?
>
> A: Well, by May of '97 it had already been close to well past a year, and my first reaction to this whole thing which dominated what happened to me, which dominated how I felt after it happened to me, was just to hide in the corner and just isolate myself and just try to handle it myself. When I got to a point of just utter frustration and realizing I wasn't getting better and the doctors weren't able to do anything for me and I just realized that my life could be like this for as long as I live. . . .
>
> Q: At some point in time you came to the conclusion that this trucker orchestrated the situation?
>
> A: I knew that from the beginning. The thing was I was hoping to get better and as time went on I got so depressed and isolated myself to such an extent. I didn't want to try to get involved in the courts or go after anybody.

(Dep. of Christopher Feist, 3/18/98, at pp. 142-45.) At his second deposition, Plaintiff stated that he did not list this claim on his bankruptcy petition because he "had no knowledge of having any claim against anybody other than receiving workers' comp." (Dep. of Christopher Feist, 6/12/98, at p. 91.) Plaintiff went on to testify that he did not believe he had any claim against Defendant until May of 1997, following a conversation with his uncle. (*Id.* at pp. 93-98.) At the evidentiary hearing, Plaintiff gave more details as to the events leading up to his

decision to seek an attorney after his worker's compensation carrier scheduled an independent medical examination:

> Once I found out about that [the medical examination], I talked to my uncle when I had seen him one day or talked to him on the phone one day and I said to him, said, you know, what am I going to do about workers' comp? I said, you know, I don't know what they are going to try to do to me or what, and I'm really scared because I'm not getting any better. I said and I have read about this in like this thing I saw, this pamphlet, and I said what do I do, what should I do. And he said it might be a good idea to call an attorney and start asking some questions about that and the other – and the other thing. And I said to him what other thing, and he said the trucking company, the third-party thing or something like he said. And I said what are you talking about, and he said maybe you have a third-party case or something to that effect. And I said do you really think I do? And I was very surprised, you know that he said that and he said, it doesn't hurt to ask.

(N.T. 11/19/98 at p. 32.) Thus, Plaintiff maintained at the hearing that actions taken by his worker's compensation carrier prompted a conversation with his uncle that led him to interview attorneys.

While Plaintiff's testimony at the second deposition and his testimony at the hearing do not directly contradict his testimony at the first deposition, it is somewhat puzzling that the only reason he originally gave for his delay in seeking an attorney was that he "didn't want to try to get involved in the courts or go after anybody." Yet,

after Defendant discovered that Plaintiff had filed a bankruptcy petition, Plaintiff testified at the second deposition and at the hearing that his delay was also caused by the fact that he did not believe he had any claim against Defendant until May of 1997. He further testified that a conversation with his uncle prompted his search for an attorney, a fact that he did not state at his first deposition despite the fact that he was asked what led him to seek an attorney.

Evaluating all of the evidence presented, it is clear that Plaintiff has not sustained his burden of proving that when he filed this action in his own name, he did so in good faith. Plaintiff's lack of interest in filing a petition in bankruptcy for several years until after he had acquired what he believed was a significant asset makes his stated intentions appear dubious. His subsequent failure to list this claim as an asset in his bankruptcy petition further adds to suspicions about his motivation. Moreover, Plaintiff began an aggressive search for an attorney immediately after his bankruptcy case was closed. The timing of these actions by Plaintiff certainly gives the Court reason to doubt that when he finally did bring this action in his own name, he did so as the result of an honest mistake.

Plaintiff's explanations fail to eliminate these doubts. His testimony as to the reason for his delay in filing bankruptcy is contradicted by other testimony in the record. He offered additional reasons to explain his delay in filing this case only after Defendant discovered his bankruptcy. Further, while Plaintiff readily provided testimony that he never told the three attorneys he previously interviewed in May of 1997 about his bankruptcy

case, he did not answer that question as to his present counsel. Thus, I find that Plaintiff has failed to carry his burden to prove that the filing of this case in his own name was an honest mistake. Plaintiff will not be permitted to substitute the trustee as the real party in interest. To allow a substitution where a plaintiff cannot establish that he was acting as the result of an honest mistake would contravene the purpose of Rule 17(a).

The bankruptcy trustee contends (along with Plaintiff) that if substitution is not permitted in this case, it is Plaintiff's creditors who will suffer most, as they received nothing during his original bankruptcy case and could receive nothing now. These concerns were raised by Judge Stapleton in *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 422 (3d Cir. 1988) (Stapleton, J., dissenting). The *Oneida* case is similar in some ways to the case now before this Court. In *Oneida*, a Chapter 11 debtor failed to disclose to the bankruptcy court a potential claim against one of its creditors. After the court confirmed the debtor's reorganization plan, the debtor brought an action against the creditor. The court of appeals, in affirming dismissal of the case, found that the debtor's failure to disclose its potential claim during its bankruptcy case precluded a later independent action on the claim by the debtor. *Id.* at 419. Further, the court held that the debtor was judicially estopped from bringing its claim because its suit indicated a position contrary to that taken by the debtor in its Chapter 11 case. *Id.* Despite the concerns raised by the dissent that it produced a harsh result for the creditors, the court held that the debtor was not permitted to bring its claim. *Id.* at 420. Thus, the interest of Plaintiff's creditors in recovering some of the

debts owed to them is not sufficient to justify substitution of the bankruptcy trustee as the real party in interest in this case.

E. CONCLUSION.

Plaintiff has failed to sustain his burden of proof which required that he demonstrate that when he filed this action in his own name it was the result of an honest mistake. This Court will not come to the aid of a plaintiff under circumstances such as this where plaintiff cannot prove that his prior actions were done in good faith. Because the Plaintiff is not the real party in interest, he is unable to state a claim upon which relief can be granted. Therefore, Defendant's Motion for Judgment on the Pleadings will be Granted.

I therefore enter the following Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER M. FEIST, Plaintiff, v. CONSOLIDATED FREIGHTWAYS CORPORATION t/a CF Motor Freight, Defendant.	CIVIL ACTION No. 97-4719 (Filed Mar. 31, 1999)

ORDER

AND NOW, this 32st day of March, 1999, upon consideration of Plaintiff's Motion to Substitute the Trustee in Bankruptcy as the Real Party in Interest, and all responses thereto, and Defendant's Motion for Judgment on the Pleadings, and all responses thereto, it is hereby ORDERED that:

1. Plaintiff's Motion is DENIED;

2. Defendant's Motion is GRANTED;

3. all other outstanding Motions are DENIED as moot;

4. the Clerk of Court is directed to mark this case CLOSED.

BY THE COURT:

ENTERED: 3/31/99
CLERK OF COURT

/s/ Robert F. Kelly
Robert F. Kelly, J.

UNITED STATES SUPREME COURT

CHRISTOPHER FEIST,
Petitioner

V.

CONSOLIDATED FREIGHTWAYS CORPORATION,
Respondent

CERTIFICATE OF BAR MEMBERSHIP

I, Neil E. Jokelson, Esquire, do hereby certify that I was duly admitted and qualified as an attorney and counselor of the Supreme Court of the United States on April 23, 1984 and remain in good standing.

DATE: 10/28/00 /s/ Neil E. Jokelson, Esquire
NEIL E. JOKELSON, ESQUIRE

UNITED STATES SUPREME COURT

CHRISTOPHER FEIST,
Petitinoer

V.

CONSOLIDATED FREIGHTWAYS CORPORATION,
Respondent

CERTIFICATE OF SERVICE

I, Neil E. Jokelson, Esquire, do hereby certify that I caused a three true and correct copies of the within application for extension of time to file a petition for writ of certiorari to be served upon all interested counsel via Hand Delivery on October 30, 2000 at the following addresses:

Andrew W. Allison, Esquire
Counsel for Respondent
Buchanan Ingersoll
Eleven Penn Center, 14th Floor
1835 Market Street
Philadelphia, PA 19103-2985

Timothy R. Coyne, Esquire
Counsel for United States Trustee
James E. O'Neil, III, Esquire
Stradley, Ronon, Stevens & Young
2600 One Commerce Square
Philadelphia, PA 19103

DATE: 10/28/00

/s/ Neil E. Jokelson
NEIL E. JOKELSON, ESQUIRE

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER **AREA CODE 202**
CLERK OF THE COURT **479-3011**

November 1, 2000

Mr. Andrew W. Allison
Eleven Penn Center, 14th Floor
1835 Market Street
Philadelphia, PA 19103-2985

Re: Christopher M. Feist
v. Consolidated Freightways
Corporation
Application No. 00A370

Dear Mr. Allison:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on November 1, 2000, extended the time to and including January 5, 2001.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk
By /s/ Clayton R. Higgins, Jr.
Clayton R. Higgins, Jr.
Assistant Clerk

IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for

or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

(c) **Infants or Incompetent Persons.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

ADVISORY COMMITTEE NOTES

* * *

1966 Amendment

* * *

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been

allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed – in both maritime and nonmaritime cases. See *Levinson v. Deupree*, 345 U.S. 648 (1953); *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C.Cir. 1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was abroad the flight, that upon discovery that Smith is alive and well, having missed the fatal

flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice – in short, to codify in broad terms the salutary principle of *Levinson v. Deupree*, 345 U.S. 648 (1953), and *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C.Cir. 1963).

* * *